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THE

AMERICAN LAW REGISTER.

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GROUND RENTS IN PENNSYLVANIA.

No. II.

As ground rent deeds are usually drawn at the present day, the owner of the rent has three remedies for the recovery of the arrearages—viz: by action, distress, and (for want of sufficient distress,) the right to re-enter and hold as of the grantor's former estate.

The progress and the reasoning of the decisions relating to these several remedies, as they affect the right of the owner of the rent to recover the arrearages, either with or without interest from the time each payment becomes due, as he should resort to the one remedy or the other, or as the deed should give one or all of them, as also the extent of his rights when they come into conflict with other lien creditors, or when there has been a judicial sale of the land without satisfaction of the arrearages, is somewhat curious.

The leading case upon this subject is that of *Bantleon vs. Smith*, 2 Binn. 146, decided in December, 1809. In this case the owner of the rent brought covenant for the arrearages; the land was sold upon his judgment and the proceeds brought into Court. The plaintiff moved to take out of Court his debt, interest, and costs—claiming interest on each payment from the time it fell due to the time

of the sale. There were judgments prior to the plaintiff's *judgment*, but subsequent to the reservation of the rent, sufficient to absorb the fund. The plaintiff claimed priority. The ground rent deed contained the grantee's covenant to pay the rent; a power to enter and distrain, and for the want of sufficient distress to hold the land *until the arrearages were fully paid*; but no power to enter and hold as of the grantor's former estate. The plaintiff was *held* entitled to the principal of the arrears, out of the fund, but not to interest—and this in preference to the other claimants.

Against the plaintiff's claim to priority it was argued—First, That by resorting to the personal remedy against the grantee by action of covenant, the *land* was totally discharged from the rent. And if not so then, *secondly*, that the remedies given by the deed were not cumulative, but alternative. That the plaintiff might have distrained; or for want of sufficient distress might have entered and held; or he might resort to the person of the grantee. But he could not enter if there was a sufficient distress; nor pursue the covenant to judgment and then distrain for satisfaction. That the lien of the landlord for his arrears is founded exclusively upon his right to distrain and for want of sufficient distress to re-enter; that if the right is gone he stands upon the footing of a common creditor; that if the *rent* is extinguished, the rights of distress and re-entry are extinguished also. And that the rent was extinguished by merger in the *judgment*, which was to be levied by execution and took its rank among other judgments solely from its date. That interest, at any rate, could not be recovered, *first*, because rent itself is interest; and *secondly*, the landlord should have made a demand on the land, and he had the means of preventing delay, and moreover, in this case there was no penalty by which the tenant could forfeit his estate; the rule being that if the tenant forfeits his estate at law, and the landlord exercises his right of entry, the tenant being forced to ask equity, might be laid under terms.

For the plaintiff it was contended that the land itself having been liable in the first instance for the arrears, he was entitled to the same priority out of the proceeds. That the plaintiff had three remedies; distress, entry and covenant, and he might use them all

until he obtained complete satisfaction. That the remedy by distress, or by entry for want of distress, was not affected by the judgment in covenant—the judgment may alter the security, but it was no satisfaction; it was no extinguishment of the original security unless it produce the fruit of a judgment, and the plaintiff's rights were therefore the same as they would have been if he had obtained no judgment himself, but the land had been sold under the judgment of another; in which case there could be no doubt, it was said, his lien would still continue, and he would be entitled to prior satisfaction out of the proceeds. That interest should be allowed because it was due upon all liquidated sums from the instant the principal becomes payable, either as damages for delay, or as compensation for the use.

Chief Justice Tilghman, who delivered the opinion of the Court, laid it down that the action of covenant for arrears of ground rent was not like the writ of annuity, which was a mere personal remedy, and by resorting to which, as in the case of a rent charge, the party made his election to bind the person exclusively, and thus discharged the land from all further liability; but that in the case of covenant for ground rent the land was not discharged. That the remedies were cumulative, and a resort to one did not exclude a resort to the others until satisfaction. That the judgment in covenant, therefore did not extinguish the rent; “but the rent still exists, or in other words, there still exists a debt on account of the arrears of rent;” that the land remained charged with the rent notwithstanding the judgment; and the plaintiff was entitled to receive the arrears out of the fund, in preference to the other claimants, but without interest.

As we understand the reasoning of this case, it is, in substance, this: The judgment had not destroyed the lien of the arrears of rent—this continued to exist, independently of the judgment.

That such is the case is proved by the fact that notwithstanding the judgment, the arrears could be recovered by the other remedies provided by the deed. This independent lien of the rent existing, the plaintiff was entitled *by virtue of it*, and not by reason of the judgment, to come in upon the fund and receive the amount of his

arrearages, to the exclusion of those whose liens were subsequent to the lien of the arrearages: viewing the case as though the fund in Court had been raised by a sale under the judgment of a stranger.

The Court, attaching no importance to the fact that the fund was the fruit of a sale upon a judgment for arrears of the rent, nor basing the right of the plaintiff to a relation back of the lien of the judgment, and awarding to him the arrears upon that judgment, but simply and exclusively upon the independent lien of the rent. If this is a correct view of the principle upon which this case was decided—and it is to be inferred that the lien of the judgment does not relate back to the creation of the rent—the principle, we submit, is unsound, because if the latter were the case, estates and mortgages coming within the Act of April 6, 1830,¹ brought into existence subsequently to the creation of the rent, would not be divested by the sale for arrearages, which is contrary to the well settled law.

As to interest upon the arrears, the Court confined their opinion to the case before them, and thought the plaintiff not entitled, because, in that case, he had resorted to the land only, and the Chief Justice says: “If a man distrain for rent, he must distrain for the precise sum due. He cannot add interest to the arrears. If the plaintiff had entered on the land by virtue of the power in this deed, he could only have held till the arrears were paid. We do not say how the case would be, if the deed gave him power to enter and hold as of his former estate; for, in that case, his former estate in fee, being revested in law, the defendant would be driven to equity for relief, and in equity it might be thought reasonable to relieve on terms of paying interest.” And this question is declared open for discussion when it should arise.

Here, interest was denied upon the peculiar covenants of the deed. The only clause which enabled the plaintiff to re-enter and *hold the land*, determined that holding upon the payment of the arrearages merely. This being all he was entitled to upon re-entry, and he having resorted to the land, he was held entitled only to what he could have obtained by re-entry—intimating that a princi-

¹ Pamp. Laws, 1830, page 293.

ple of equity might have been invoked, and the result might have been different, had the deed contained a clause of re-entry *as of the grantor's former estate*.

This case is referred to by all the subsequent cases as the leading authority upon this subject, and as settling the right of the owner of the ground-rent to be paid his arrearages out of the fund derived from a judicial sale of the land, and this in preference to lien creditors claiming under liens subsequent in date to the creation of the rent. Upon the argument of this case, however, the manuscript case of *Potts vs. Rhoades*, decided in the Court of Common Pleas for Philadelphia, by Biddle,, P. J., in which the law was held the same way, was cited by counsel, and referred to in the opinion of the Court as entitled to great weight.

The next case was that of *Sands vs. Smith*, (3 W. & S. 9,) decided at December Term, 1841. There had been a sale of the land under a mortgage. Subsequently a distress was made upon the land for arrears of rent which had principally accrued prior to the sale, with interest upon the arrearages, and the goods were replevied. The deed contained a covenant by the grantee to pay the rent, and the clause of distress; but gave no right of re-entry either to hold until the arrears were paid, or to hold as of the grantor's former estate. The land was granted in fee, but the rent was reserved for a term of years, to commence after the lapse of seven years from the date of the deed. The cause came before the Court below upon a case stated, and judgment was given for the plaintiff in replevin. This judgment was reversed in the Court above, where it was held that the defendant was at liberty to distrain for the arrears due at the time of the sheriff's sale.

Chief Justice Gibson delivering the opinion of the Court, says he "never understood on what principle of lien the case of *Bantleon vs. Smith* was decided," but declares it "not to be his purpose to disturb, or cast the least shadow on its authority, or to do more than show that it is not founded in any principle of lien peculiar to the reservation of a ground rent which it is necessary to carry out further than the decisions have already carried it." The Chief Justice then alludes to the case of *Nichols vs. Postlethwaite*,

(2 Dall. 131,) in which a legacy charged on land was allowed to be taken out of the price of it in the sheriff's hands, and says that this, as well as all others of the same stamp, depend for their authority exclusively on precedent, and their very great convenience, as well as on the policy of giving the sheriff's vendee a clear title, when it is practicable. But that neither policy nor convenience will justify an extension of the principle of them to the price of land which was not liable to be reached for the debt; and that in all of the precedents the money was not only charged, but there was a means of subjecting the land to the payment of it. He then adverts to the fact that in *Bantleon vs. Smith*, the deed contained a clause of re-entry by which the land itself might have been seized, and the produce of it applied to the payment of the rent; and also that in *Nichols vs. Postlethwaite*, the land might have been sold on judgment and execution for the legacy, and suggests that it was, perhaps, the difficulty of reaching it in either of those ways, which induced the Courts to apply the proceeds of it when turned into money. He then asks, "Now, what is the remedy by distress—the only one provided in this conveyance?" And he answers, "It is as much a personal one as an action on a covenant in the deed; it is even more so, as the land may be reached by such an action, while it cannot be reached by a distress, which operates merely on chattels found upon it."

It is true that in this case, as stated by Stroud, J. in *Western Bank vs. Willitts* (2 P. L. J. 46), the rent is reserved for a term of years, but the Court draw no distinction between such a case and an ordinary reservation in fee, and the whole scope of the reasoning treats the rent as an ordinary ground rent; and the case is discussed in reference to the authority of *Bantleon vs. Smith*.

The case, however, at first sight appears somewhat ambiguous, and this because so much stress seems to be put upon the allegation that there were no means provided by the deed of subjecting the land to payment of the rent. It proceeds upon the assumption that distress was the only remedy provided by the deed for the recovery of the rent; that there was no means thereby given for subjecting the land to the payment of it; that, therefore, there could

be no resort to the fund which was the proceeds of the sale of the land; and that where such was the case, at any rate, the right of distress, which was a totally distinct remedy from any looking to the land itself, remained unaffected by the sale.

The Chief Justice refers to the case of *Nichols vs. Postlethwaite* with apparent approbation, certainly without gainsaying it, and assigns as the probable reason why the Court, in that case, sanctioned a resort to the fund, that the land might have been *sold on judgment and execution* for the legacy. Now, in the very case of *Sands vs. Smith*, which the Chief Justice was deciding, precisely the same thing could have been done, for the remedy by distress was *not* the only one furnished by the deed, but the covenant to pay was there also, by means of which the land "might have been sold on judgment and execution" for the rent. It might, therefore, seem that if the Chief Justice intended to endorse the case of *Nichols vs. Postlethwaite*, upon the ground named by him, he must have overlooked the facts in *Sands vs. Smith*, and the reasoning upon which the decision in the latter case is based would be, therefore, erroneous. But we do not think this a correct view of the case. The Chief Justice adverts to the fact that in all the precedents the money was charged on the land. In *Nichols vs. Postlethwaite*, although the legacy was not expressly charged upon the land, yet it was thus charged by operation of law, and the judgment and execution would have been but the means of reaping the fruits of this charge, whereas, in *Sands vs. Smith*, there having been *no right of re-entry* provided by the deed, the rent, as we shall have occasion hereafter to remark, was not a charge on lien upon the land, and an execution upon a judgment for such rent could be levied upon the land only in the same manner as it could be levied upon any other property of the defendant. In the one case the land was made debtor for the money, without regard to the judgment, and in the other it was not.

We have said *the reasoning* upon which the decision in *Sands vs. Smith* was based might seem erroneous, if the case of *Nichols vs. Postlethwaite* were sustained upon the ground mentioned; and we have said this because we are not prepared to affirm that the *result*

would have been different had the Court been of opinion that under the deed the owner of the rent could have resorted to the fund, (although the argument certainly leans that way) for the Court seem to intimate that, upon principle, whether the arrears of the rent be thrown upon the lien creditors, or on the purchaser, "the remedy by distress of chattels on the land is as accessible in the one case as in the other; and there is no legal necessity that the arrears should be taken out of the fund in Court." The doctrine of the case of *Bantleon vs. Smith* is, that the remedies are *concurrent*, and all may be pursued *until satisfaction*. Suppose, then, a resort to the fund without any, or without complete satisfaction—does not the right of distress still exist for the whole in the one case, and the balance in the other? Nay, further, is not the doctrine of this case broad enough to sanction the idea that, though the deed contains all the usual covenants, there is no obligation on the part of the owner of the rent to resort to the fund, in order to preserve his right of distress? If each of the several remedies may be pursued until satisfaction, and if a judicial sale does not, as is shown by *Sands vs. Smith*, necessarily destroy the right of distress in the same manner as the lien against the land itself for the rent would be devested, this result might seem to follow. At all events the extent to which the cases have gone is, that where the deed provides an express remedy against the land, the owner of the rent must resort to the fund, and the land passes to the purchaser discharged of any liability against *it*; but if the deed provides no such remedy, or no such remedy by re-entry, the right of distress remains. No case has *held* that the right of distress is gone when the deed gives the remedy, by re-entry, against the land. And if this right survives, since ground rents are rents service, to which distress is inseparably incident, the case would not seem to be altered if the deed did not contain the clause of distress.

As to the "*principle of lien*" on which *Bantleon vs. Smith* was decided, and which Chief Justice Gibson declared he could never understand, we have now a word to say.

The distinguished counsel who argued the cause for the judgment creditors stated, that the "lien of a landlord for his arrears is

founded exclusively upon his right to distrain, and for want of distress to *re-enter*." The Court assumed the lien to exist, but evidently did so upon the grounds on which the argument of counsel had placed it; for in discussing the question of interest upon the arrears, Chief Justice Tilghman *limits* the right of the owner of the rent to the principal of the arrears, *because* his right of re-entry under the deed gave him the right of holding only until the principal was paid, and intimating that if the deed had given the right of re-entry as of the grantor's former estate, he might have been entitled to interest also—thus *measuring* the *extent* of the lien by that of the right of re-entry. Chief Justice Gibson, himself, surmised that this, together with the principle of policy of giving the sheriff's vendee a clear title where practicable, was probably the principle of the lien. This subject is noticed and commented upon in volume II. of Penn. Law Jour., page 182. The writer alludes to the decision in *Bantleon vs. Smith* as to the *priority* of the lien for rent, and says: "But it is remarkable that no principle is referred to by the counsel on either side, or by the Court, as the foundation of the doctrine. It is treated all around as if it were a consequence of the rights of distress and re-entry reserved by the deed; but nothing is said to show how this consequence is to be inferred, nor is the justice of the mere inference gainsayed by the opposite counsel." It is very true that no explanation is given as to how the priority of lien is the result of the right of distress and re-entry. We think, however, *the reason* is obvious. The right of re-entry gives to the owner of the rent the right against the grantee of the land, and those claiming under him, to enter upon and hold the land either until his arrears are paid, or as of the grantor's former estate, as the case may be. This right existing, the owner of the rent has a right to the land itself against all persons from the date of the grantee's deed whereby the rent is reserved, down to the last owner or incumbrancer claiming under him. In view of this right, either because the law abhors forfeitures, or for convenience sake, or by reason of the principle of policy of giving the sheriff's vendee a clear title, where practicable, when the land is sold and converted into money the Courts have held this right to the land to

be transferred to the fund so far as to pay the arrears, sometimes with and sometimes without interest, according to the circumstances of each particular case. *This right once transferred* to the fund, therefore, *necessarily* reverted back to the date of the ground-rent deed, and took priority over all claiming under the grantee subsequently. This seems plain and reasonable. The writer alluded to, however, suggests another principle by which the lien could be sustained, and which we think entitled to consideration. It is that of equitable lien for the purchase money of the land. A ground rent is the purchase money, and, although the principle of equitable lien has been exploded in Pennsylvania, as stated by Chief Justice Gibson in *Sands vs. Smith*, yet, observes this writer, at the time of *Bantleon vs. Smith* it had not been questioned here; and the objections to the principle are founded altogether upon our policy as to notice of liens, which could not apply to the arrearages of rent, as no new principle of notice is introduced.

The next case in point of time was that of *Buck vs. Fisher* (4 Wh. 516), decided in 1839. This was an action of covenant for arrears of the ground-rent. The deed contained the "usual covenants on the part of the grantee." On the trial below, the judge charged the jury that the plaintiff was entitled to interest from the several days on which the ground-rent became payable. Upon exceptions to the charge this point was given up on the argument before the Court above, and the judgment was affirmed without allusion to it.

This case was succeeded by *Dougherty's Estate* (9 W. & S. 189), decided December Term, 1844. There had been a sale of the land under the judgment of a stranger. Arrearages of ground rent and interest were claimed. The deed contained the clause of distress, and if sufficient distress not found, to enter and rent the premises for such a length of time as might be sufficient to discharge the rents, and if neither goods nor buildings be found, and the rent be in arrear over one hundred dollars, then to hold as though the indenture had not been made. The arrears exceeded one hundred dollars. The Court below confirmed the auditor's report, awarding the principal without the interest of the rent, and this judgment, on the authority of *Bantleon vs. Smith*, was affirmed.

Next followed *Pancoast's Appeal*, (8 W. & S. 381,) decided March Term, 1845. The land was sold under the judgment of a stranger. The ground rent deed contained the usual covenants and clauses of distress, re-entry, &c. The Court below decreed the arrears of ground-rent *and interest* out of the fund, and this decree on appeal was *affirmed*. No allusion whatever being made by the Court or counsel, as far as appears from the case, to the claim for interest. The opinion is very brief, re-affirming *Bantleon vs. Smith*, and repeating that *Sands vs. Smith* was not intended to impair its authority, and intimating that the former case "was not thought to be so conclusively founded in legal reasoning, as to be a rule for cases in which the premises were not debtor for the rent," in which latter description *Sands vs. Smith* was supposed to fall. In reference to the main point, the Court say, "Here there was a clause of re-entry, as there was in *Bantleon vs. Smith*; and as the tenant's estate was immediately liable to make satisfaction, what matters it whether it has been sold on a judgment recovered by a stranger, or on a judgment recovered by the landlord on the covenant in his ground rent deed? The landlord had a lien on the estate of the tenant, and he may have recourse to its substitute brought into Court, however the conversion into money may have been effected."

The last case we have to notice is that of *Ter-Hoven vs. Kerns*, (2 Barr, 96,) decided December Term, 1845. This was also a sale by a stranger, and arrears of ground rent, with interest, were claimed. No reference is made in the case to the covenants in the ground rent deed, but it was *held*, and seems to have been stated as a general proposition, on the authority, again, of *Bantleon vs. Smith*, that the owner of the rent was entitled to the *principal*, but *not the interest*, out of the fund.

Such are the authorities upon this subject, and we think the following conclusions are to be drawn from them:—

First. Without regard to the special covenants in the ground rent deed, if the proceeds of the sale of the land are not sufficient to pay the arrears of ground rent, the owner of the rent may distrain upon the land in the hands of the Sheriff's vendee, for whatever amount the fund was deficient.

Second. That it is at least questionable whether he is bound in any case (except of course, that of his own sale,) to resort to the fund, but may distrain upon the land after the sale, for the arrears due before.¹

Third. If the deed contains no clause of re-entry, and the land is not otherwise expressly subjected to the payment of the rent, and there is a sale under the judgment of a stranger, the owner of the rent can neither resort to the fund, nor the land in the purchaser's hands, but may distrain.

Fourth. If there be no clause of re-entry in the deed, and the land is sold under a judgment in covenant for arrears, the plaintiff would not be entitled to any preference over those whose liens were prior to his *judgment*. But,

Fifth. If there is a clause of re-entry, the lien of the owner of the rent relates back to the creation of the rent, taking precedence of all subsequent liens, and this whether the sale be under his own judgment, or that of a stranger.

Sixth. If there be a clause of re-entry *to hold until all arrearages are paid*, and not as of the grantor's former estate, the owner of the rent is entitled to the principal of the arrearages, but not to the interest, and this whether the sale is under his own judgment for arrears, or upon that of a stranger.

Seventh. If there be a clause of re-entry *to hold as of the grantor's former estate*, (or "the usual covenants on the part of the grantee,") and the sale is under a judgment in covenant for arrears, the owner of the rent is entitled to the principal of the arrears with interest from the time each payment became due. And,

Eighth. In no case of distress, or resort to the fund, where the sale has been under the judgment of a stranger, can the owner of the rent receive more than the *principal* of the arrears—the precise sum due without interest. For we regard *Dougherty's Estate*, as to interest, to be an oversight, or at any rate, overruled by the subsequent case of *Ter-Hoven vs. Kerns*.

This we submit to be the result of the authorities, unless *Ter-Hoven vs. Kerns* is to be taken as deciding that in *all cases* of a

¹See 2 Penn. Law Jour. 359.

sale by a stranger, without regard to the covenants in the deed, the *principal* of the arrearages are payable out of the fund; and that interest is not recoverable at all, even in an action for arrears. As to the latter point, the Court say "that the owner of the rent is entitled to have the principal of the rent out of the moneys arising from the sheriff's sale, was settled in the case of *Bantleon vs. Smith*, but not to the interest thereon. This rule has been uniformly observed and adhered to ever since." Now, *Bantleon vs. Smith* was an action of covenant for arrears, and the Court in *Ter-Hoven vs. Kerns*, citing the case for so general a proposition, in a cause where the covenants of the deed are not even alluded to, might seem to imply that it was intended to announce a general rule, applicable to all cases. But the Court, in *Bantleon vs. Smith*, expressly disclaim any intention of laying down any general rule, and explicitly stating that the case was decided upon the covenants of the particular deed in that case, say that the question as to interest is open for discussion when it shall arise under different covenants. We apprehend, therefore, that *Ter-Hoven vs. Kerns* must be confined to the particular circumstances of that case—a fund raised by a sale under the judgment of a stranger, and probably nothing unusual in the covenants of the deed.

Upon the principle of the cases we have been considering, we do not so readily perceive why interest is allowed upon arrears of rent in an action of covenant, and not so when paid from the fund raised by a sale under the judgment of a stranger.

Bantleon vs. Smith, as we have just seen, was covenant for arrears, and the party was held not entitled to interest because the right of entry was limited to holding only until arrearages were paid; the Court intimating that if the deed had given the right to enter and hold as of the grantor's former estate, he *might* have been entitled to interest also. *Buck vs. Fisher* was also an action of covenant for arrears; and the deed contained the "usual covenants of the grantee," among them, of course, the right to re-enter and hold as of the grantor's former estate. It is a fair inference, therefore, that interest was held to be recoverable in the latter case by virtue of this right to re-enter. Such being the case, why should

the right of re-entry not have the same effect when the fund produced by a sale under the judgment of a stranger is resorted to? The right of re-entry *per se* has no direct bearing upon, or necessary connection with the action of covenant; but is a distinct and independent remedy for the recovery of the arrears of rent. The connection which does exist is altogether indirect, and brought about by the Courts themselves. And they bring it about, as we have seen, in this wise: upon re-entry for failure to pay the rent, the land is forfeit at law, and the owner must seek the aid of equity, which would relieve upon the terms of paying *interest*, as well as principal. Now, forfeitures are odious in the law; and the remedy by re-entry is an inconvenient one; therefore, the owner of the rent shall be encouraged not to adopt this remedy for the collection of his arrears, but when he resorts to the personal action of covenant, he shall be entitled to recover the arrearages *with interest*. Why does not the same argument apply where a resort is had to the proceeds of land converted into money under the judgment of a stranger? It is by virtue of this right of re-entry, and for the same reasons, that the Courts, in this case, hold the owner of the rent to be entitled to the principal of the arrearages; and why should he not as well be entitled to the interest? If he entered he could hold until paid the principal and interest, but, for the reasons given, he need not re-enter, but may come upon the fund. Why, then, should he not come upon it to reap all the advantages to be derived from re-entry? We perceive no reason for the distinction made.

The length to which this article has extended precludes us from doing more, in closing, than merely adverting to one or two other points connected with our subject.

A previous demand for arrears of ground rent is not necessary to the maintenance of an action of covenant against an assignee; nor is demand necessary before making a distress.¹ Arrears due upon several lots of ground by the same person to the same plaintiff, may be recovered in one action, though the defendant has acquired title to the several lots from different persons, and at different times.²

¹ *Royer vs. Ake*, 3 P. R. 461.

² *Ibid*, 461.

In the case of re-entry, as is well known, much particularity is required. To entitle the owner of the rent to enter, there must first be a demand of the precise rent due, on the very day on which it becomes due, and on the most notorious place on the land; and this although the land is vacant and unenclosed.¹ Where a power of re-entry is reserved for non-payment of rent, if sufficient distress should not be found on the premises, it is incumbent on the party entitled to the rent, who seeks to enforce this right by ejectment, to show that there was not sufficient property on the premises to pay the rent;² if there be a forfeiture for not erecting buildings on the lot, under the stipulations of the deed, a receipt of rent after the time provided for the erection of the buildings, is a waiver of the forfeiture;³ and if there be no clause of re-entry in the deed, ejectment will not lie to enforce the payment of the rent.⁴

M.

In the Circuit Court of the United States.

DEVOE ET AL. vs. THE PENROSE FERRY BRIDGE COMPANY.

1. A Court of the United States has the power to prevent by injunction, the present or future erection of any bridge under the authority of one of the States, that by its construction will interfere with the navigation of a public stream upon which there is a commerce to any considerable extent with other States, though such stream lies wholly within the limits of the State. The question in such case is relative, whether the bridge be or be not a greater obstruction to commerce than benefit to the public.
2. In such case, unless irreparable damage would be done to the defendants thereby, and though an answer be put in denying both the fact and the law, an interlocutory injunction may be granted upon affidavits, at once, until further order; and an issue may be then directed to determine whether the bridge under its present form, &c., is a nuisance to the navigation of the river, and if so, whether any bridge can be constructed at the particular spot which will not be a nuisance.

This was an application to Mr. Justice Grier, for interlocutory injunctions in three cases, involving the same state of facts.

¹ McCormick vs. Connell, 6 S. & R. 151.² Newman vs. Rutter, 8 W. 51.³ Ibid, 51.⁴ Kenege vs. Elliott, 9 W. 258.